ORIGINAL

Supreme Court, U.S.
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APR 22 2002

NO. 01-1385

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections;
JAMES E. PRICE, Superintendent of the
State Correctional Institution at Greene;
RAYMOND COLLERAN, Superintendent
of the State Correctional Institution at
Waymart; COMMONWEALTH OF PENNSYLVANIA

Petitioners,

v.

GEORGE E. BANKS

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Albert J. Flora, Jr., Esq.
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592
Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether retroactivity analysis under *Teague v. Lane* was not required where the State Court ruled on the substantive merits of the Mills claim?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

2. Whether the Pennsylvania Supreme Court's rejection of the Mills claim was unreasonable?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

3. Whether Mills applies retroactively is not ripe for adjudication by this Court as the Third Circuit did not address this issue in deciding Banks claim?

REASONS FOR DENYING THE WRIT

I.

RETROACTIVITY ANALYSIS UNDER *TEAGUE v. LANE* WAS NOT REQUIRED WHERE THE STATE COURT RULED ON THE SUBSTANTIVE MERITS OF THE MILLS CLAIM

In state collateral review proceedings, Banks asserted that the jury instructions and verdict slip given to the jury during the penalty phase of his state capital trial violated *Mills v. Maryland*, 486 U.S. 387 (1988). The Pennsylvania Supreme Court, pursuant to its "relaxed waiver doctrine", addressed the substantive merits of the *Mills* claim concluding that neither the jury instructions nor verdict slip violated the dictates of *Mills*. *Commonwealth v. Banks*, 656 A.2d 467, 470 (1995). Under Pennsylvania's "relaxed waiver doctrine", the state supreme court, on both direct and collateral review, addresses all issues arising in a death penalty case irrespective of any waiver. *Banks* at 475, fn. 13.[1]

Since the state court had decided the substantive merits of the Mills claim, the Third Circuit was correct in concluding that a retroactivity analysis was not required given the underlying rationale of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). App. 29-32. *Teague* insures that federal courts, in adjudicating habeas petitions, will not dispose of those petitions on the basis of new constitutional standards, absent certain exceptions, when the state courts faithfully applied existing constitutional standards at the time the state proceedings took place. *Teague* at 306, 307. 310. Therefore, if *Mills* announced a "new rule", *Teague* would preclude the federal courts from applying *Mills* in habeas proceedings if the claim was decided in state court before the decision in *Mills*. Here, Banks' claim arose after the decision in *Mills*, and the Pennsylvania Supreme Court had a full opportunity to and did

[1] Pennsylvania's "relaxed waiver doctrine" had been applied in all direct and collateral review proceedings involving capital cases until *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693 (1998). In *Albrecht*, the Pennsylvania Supreme Court announced that it would no longer apply the "relaxed waiver doctrine" in collateral review proceedings. As such, all capital defendants, prior to Albrecht, had the merits of their claims addressed on either direct or collateral review irrespective of a finding of waiver.

apply *Mills* to Banks' claim. Therefore, the underlying principles of comity and finality within *Teague* are not offended by the application of *Mills* to Banks' habeas proceedings.

Petitioner's reliance on *Glock v. Singletary*, 65 F.3d 878, 889 (11th Cir. 1995) that the *Teague* analysis by a federal court in a habeas proceeding is not mooted by a state court's choice to apply new law is misplaced. In Glock, the Florida Supreme Court summarily affirmed the lower court's denial of Glock's claim, which sought to apply the standard in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992). The lower court, without explanation, concluded that Glock's claim was "without merit". *Glock* at 882. As such, the Florida state courts never substantively decided the merits of Glock's claim nor is there any suggestion that a doctrine similar to Pennsylvania's "relaxed waiver" was implicated.

The Third Circuit was therefore correct in its conclusion that it was not imposing a "new rule" not considered by the Pennsylvania Supreme Court because that court in fact did consider and apply it. App. 32. Furthermore, the Third Circuit's conclusion did not create a rule, as suggested by Petitioner at page 10 of its brief, that the "clearly established" provisions of AEDPA had replaced *Teague*. The Third Circuit, as a result of the Pennsylvania Supreme Court's application of *Mills*, was left to determine whether that application complied with the AEDPA standards.

THE PENNSYLVANIA SUPREME COURT'S REJECTION OF THE MILLS CLAIM WAS UNREASONABLE

Petitioners claim that certiorari should be granted "to reaffirm the principle that reasonable state court opinions must be respected" under AEDPA. Petitioner's brief at page 20. The Third Circuit, however, carefully applied the standard for evaluating a jury instruction under *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed 2d 316 (1990), *reh'g denied* 495 U.S. 924, 110 S.Ct. 1961, 109 L.Ed. 2d 322 in determining whether the Pennsylvania Supreme Court was unreasonable in its application of *Mills* to the jury instructions, and verdict slip at issue here. To that end, the Third Circuit

considered as a whole, the jury instructions, verdict slip and jury poll and the Pennsylvania Supreme Court's analysis of the *Mills* claim.

The Pennsylvania Supreme Court in its *Mills*' analysis failed to examine the entire jury instruction instead focusing on three lines of the instruction. The court then concluded that the instruction did not violate *Mills* because it mirrored the language found in the death penalty statute of Pennsylvania's sentencing code which it had previously determined to not to violate *Mills*. The Pennsylvania Supreme Court provided no further analysis. *Commonwealth v. Banks*, 656 A. 2d 467, 470 (1995). This superficial analysis violates the dictates of *Mills* and *Boyde*. The entire jury instruction was not examined nor did the state court make any attempt to determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence". *Boyde*, 494 U.S. at 378, 380.

In examining the Banks jury instructions, the Third Circuit noted that the charge frequently emphasized the importance of a unanimous finding within the mitigating circumstances clause of the instructions. The burden of proof instruction did not distinguish between the unanimity requirement for aggravating circumstances and the requirement for mitigating circumstances. App. 41, 43. Finally, the Third Circuit agreed with Banks that jurors were specifically instructed to "agree" on their "findings". App. 41, fn. 23. Under this analysis, the Third Circuit properly concluded that there was a reasonable likelihood that the jury applied the instruction in a way that prevented consideration of constitutionally relevant evidence. App. 44.

The Pennsylvania Supreme Court, in its examination of the verdict slip, did not comply with *Mills* as it never analyzed the content and implications of the verdict slip and failed to assess whether the need for unanimity in the finding of mitigating evidence is one that "a reasonable jury could have drawn...from the verdict form employed." *Banks*, 656 A.2d at 471. In examining the verdict slip, the Third Circuit saw the creation of ambiguity and confusion suggesting jury unanimity on mitigating circumstances. This constitutionally flawed verdict form was caused by the lead in language "We the

jury have found unanimously..." followed with references to aggravating and mitigating circumstances and the absence of additional language implying different standards for aggravating and mitigating circumstances. App. 45-48.

WHETHER MILLS APPLIES RETROACTIVELY IS NOT RIPE FOR ADJUDICATION BY THIS COURT AS THE THIRD CIRCUIT DID NOT ADDRESS THIS ISSUE IN DECIDING BANKS CLAIM

As discussed infra, the Pennsylvania Supreme Court had applied *Mills*, and the Third Circuit had therefore correctly concluded that *Teague* was not implicated. The Third Circuit, given this conclusion, made no determination as to whether *Mills* constituted a "new rule" or whether any of the exceptions under *Teague* applied. App. 31-32. Therefore, it is impossible to know how the Third Circuit would rule on this issue, and whether and to what extent it would be in conflict with other circuits. The Third Circuit did, in a footnote, reference decisions of other circuits on the Mills/Teague issue. App. 30, fn.16. The Third Circuits reference questions the existence of the conflict as suggested by Petitioners. Under these circumstances, the Teague/Mills issue is not ripe for adjudication. A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated or indeed may not occur at all." *Texas v. U.S.* 118 S.Ct. 1257 (1998). The issues of whether the Third Circuit will determine that *Mills* constitutes a "new rule" and whether such a rule fits within the *Teague* exceptions cannot be left to the power of imagination. Adjudication of these issues must be delayed until the Third Circuit has had the opportunity to consider these issues on the merits in Banks.

CONCLUSION

For all the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari.

Albert J. Flora, Jr., Esq.
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592
Counsel for Respondent

IN THE
UNITED STATES SUPREME COURT

MARTIN HORN, et al., Petitioners	:	NO. 01-1385
v.	:	
GEORGE E. BANKS	:	

CERTIFICATE OF SERVICE

I, SCOTT C. GARTLEY, a member of the Bar of this Court and counsel for petitioners, hereby certify that on this 7th day of May, 2002, three copies of Petitioner's Reply were mailed, first class postage prepaid, to each of the following:

Albert J. Flora, Jr., Esquire
33 West South Street
Wilkes-Barre, PA 18701
(570) 825-6592

William Ruzzo, Esquire
590 Rutter Avenue
Kingston, PA 18704
(570) 288-7799

Kent S. Scheidegger, Esquire
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816
(916) 446-0345

I further certify that all parties required to be served have been served.

SCOTT C. GARTLEY
(Counsel of Record)
Assistant District Attorney
Luzerne County Courthouse
200 North River Street
Wilkes-Barre, PA 18711
(570) 825-1692

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Criminal Justice Legal Foundation

2131 L Street, Sacramento, CA 95816 • P.O. Box 1199, Sacramento, CA 95812 • (916) 446-0345
Fax: (916) 446-1194 • e-mail: cjlf@cjlf.org • Web page: http://www.cjlf.org

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Date & Time: May 6, 2002

Pages: 2, including cover

To: Kathy Tycz
Company: U.S. Supreme Court
Fax Number: 1-202-479-3230

From: Kent S. Scheidegger

Re: *Horn* v. *Banks*, No. 01-1385

Attached is the consent from petitioner in the case named above.